IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No. 343 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE P.B.MAJMUDAR

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SHREE JAGDISH SWEETS AND FARSAN AND ANOTHER
Versus
JAGDISH FOODS PVT LTD

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Appearance :
MR YJ TRIVEDI for the Appellants
MR GC RAY for the Respondent

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CORAM : HONOURABLE MR.JUSTICE P.B.MAJMUDAR

Date : 20/02/2007

ORAL JUDGMENT:

Since the matter was already heard and kept for judgment, now it is disposed of today and a formal order of admission is passed today. Mr Ray waives service of notice of admission. Matter is now disposed of by

this judgment with the consent of the parties as the parties had already submitted the lengthy arguments on the merits of the matter.

2) The appellants herein are the original defendants of Regular Civil Suit No.7 of 2005. The aforesaid suit is filed by the respondent herein. The aforesaid suit is filed by the plaintiff, Jagdish Foods Private Limited for permanent injunction against the defendants restraining the defendants from infringing the trade marks and copy rights of the plaintiffs. The case of the plaintiff is that the plaintiff is a registered private limited company engaged in the business of manufacturing and marketing of farsan items like Khaman, Bhakarwadi, Khamani, Bhujia, Sev, etc. in the name and style of M/s Jagdish Foods Private Limited. It is also the case of the plaintiff that the plaintiff's father and forefathers were previously dealing in the same business in the name and style of "Jagdish Farsan" in the city of Vadodara and the plaintiff has been in the said business since the time of his forefathers. The plaintiff is doing the business in the name and style of "Jagdish Foods Private Limited" which has a trade mark containing the word "Jagdish". It is also the case of the plaintiff that the said trade mark is registered with the Trade Mark Registration Office with the word "Jagdish" and logo and the goods packed in the plastic bags with a distinct get up, design, colour combination, etc. which distinguishes the plaintiff's case from the case of the rest of the farsan traders. It is also the case of the plaintiff that the plaintiff has incurred huge amount, labour and has achieved the goodwill in connection with the goods in question and that the word "Jagdish" has become very popular through out the State of Gujarat. It is also the case of the plaintiff that the plaintiff has exclusive trade mark being the proprietor of the said trade mark and the defendant is willfully using the plaintiff's trademark with a view to create confusion in the minds of consumers and to deceive them. It is the case of the plaintiff

that for using name of “Jagdish” in connection with his goods the defendant is trying to take undue advantage of the goodwill. It is also the case of the plaintiff that the defendants have adopted plaintiff's trademark “Jagdish” in their business and thereby creating an impression amongst the customers that they are purchasing farsan and sweets of the plaintiff. It is also the case of the plaintiff that the defendants are infringing the trademark of the plaintiff and are also passing off the goods as that of the plaintiff. On this and such other averments, the aforesaid suit is filed. In the aforesaid suit the plaintiff also submitted an application for interim injunction at Exhibit 5 restraining the defendants from using the plaintiff's trade mark and from using the trademark of the plaintiff, namely, “Jagdish” in any manner on its label or for passing off the goods under the said word “Jagdish”. The appellants who are original defendants in the said suit appeared in the said suit and resisted the suit as well as interim injunction application by filing a reply at Exhibit 19. Defendants denied the said suit of the plaintiff. It is the case of the defendants that the defendants are the proprietor of the firm known as “Shri Jagdish Sweet and Farsan” and that they are running their business under the said name and style in the city of Vadodara since 1998 and that they are manufacturing and marketing various types of farsan and sweets. It is also the case of the defendants that there are other 13 shops in the Vadodara city who are also manufacturing and marketing their products and are using the word “Jagdish” in the city of Vadodara. It is also the case of the defendants that they are members of Shri Vadodara Saher Mithai Farsan Utpadak Vepari Mandal and as the defendants have adopted the trademark “Shri Jagdish” so as to distinguish their products from the products of others. It is also the case of the defendants that the word “SJSF” is an invented word by the defendants for their own products and other traders including that of the plaintiff. It is also the case of the defendants that

the defendants are using the said words “Shri Jagdish” since 1988 and they have invested huge amount for getting their trade name popular. It is also the case of the defendants that the plaintiff has wrongly got their trademark registered before the Registrar of Trade Marks. It is also the case of the defendants that word “Jagdish” is most generic name in the farsan products and it is a name of Lord Vishnu and the plaintiff cannot have any exclusive right in connection with the same. It is also the case of the defendants that they hare already filed an application under Section 57 of the Trade Marks Act before the appellate authority for rectification/ cancellation of the plaintiff's trademark, which is pending for decision. On this and such other averments the aforesaid suit as well as interim injunction application of the plaintiff is resisted by the defendants.

3) The learned trial Judge after hearing both the sides and after considering the prima facie evidence on record came to the conclusion that the plaintiff has proved his prima facie case and that if the injunction is not granted, the plaintiff will suffer irreparable injury. The learned trial Judge has taken into account the fact that the plaintiff has already got the name registered under the Trade Marks Act, 1999. The trial Court came to the conclusion that looking to the goodwill and reputation of the plaintiff and considering the fact that the plaintiff is doing business since last many years and much prior to the defendants, the plaintiff has prima facie proved that the plaintiff is the prior user and has also proved that the defendants are trying to pass off their goods as that of the plaintiff's and that it may affect the goodwill and reputation of the plaintiff. The trial Court also found that on comparison, the defendants can be said to be using the said trademark in a deceptively similar manner and that the plaintiff has suffered irreparable injury and loss due to illegal adoption of the plaintiff's trademark. The trial Court

has also found that the balance of convenience is in favour of the plaintiff. The trial Court also found that the defendants are using the replica of the plaintiff's trademark on their box and a comparison of two labels show that the customer is likely to be led away in believing the defendants' label to be that of the plaintiff's. The trial Court also found that it is the case of breach of copy right of the plaintiff and that the defendants are trying to do business under a name so closely resembling to that of the plaintiff so as to cause confusion in the minds of the general public. Considering the aforesaid aspect of the matter, the learned trial Judge by the impugned order dated 17th August 2005 allowed the injunction application preferred by the respondent-plaintiff and the defendants, their servants and agents and dealers are restrained by interim injunction from using the trade name and word “Jagdish” on their labels, box, signboards and passing off the goods under the said trade name till the final disposal of the suit. The aforesaid order of the trial Court is impugned by way of this appeal from order, which is preferred under Order 43 Rule 1 of the Civil Procedure Code by the original defendants.

4) Learned advocate, Mr Y.J. Trivedi for the appellants submitted that it is no doubt true that the plaintiff has registered his trademark in the name of “Shri Jagdish Foods Private Limited”, which is a label and not the word “Jagdish” per se. He further submitted that the word mark of the appellants is “Shri Jagdish Sweet and Farsan” and words “sweet” and “farsan” do not appear in the name of the plaintiff and similarly words “foods private Limited” of the plaintiff do not appear in the word mark of the defendants. He further submitted that there are more than 13 other persons in the market of Vadodara using various different names containing the word “Jagdish” in the farsan business and some of them are doing business even prior to the plaintiff. He further submitted that

word “Jagdish” is a common word originated from Lord Vishnu and it is commonly used by the traders doing the business in farsan and, therefore, the learned trial Judge has gravely erred in holding that the defendants have tried to infringe the trademark of the plaintiff as the defendants are using only the word “Jagdish”. He, therefore, submitted that there cannot be any question of passing off action as the other traders are already doing the business in the said trade name. Mr Trivedi also further submitted that there is a distinguishing feature between the trademark used by the plaintiff and the trademark used by the defendants and the entire mark cannot be said to be similar if the same is read as a whole. It is further submitted by Mr Trivedi that there is nothing on record to show that “Jagdish Foods Private Limited” is the same as that of “Jagdish Khaman House” as Jagdish Khaman House is already in the market today. He submitted that in any case when others are using the words the word “Jagdish” in the matter of marketing their farsan products, there is no question of considering the case of the plaintiff in connection with passing off action. It is therefore submitted by Mr Trivedi that the trial Court has committed an error in granting the injunction.

5) Learned advocate for the respondent – original plaintiff, Mr G.C.Ray on the other hand submitted that the trial Court has given cogent reasons for granting injunction to the plaintiff and that this being a miscellaneous appeal under Order 43 unless it is found that the order is arbitrary and against the provisions of law, normally, this Court in appeal from order, would not interfere with the discretionary order passed by the trial Court. Mr Ray also further submitted that the forefathers of the plaintiff used to do the business in the name and style of “Jagdish Khaman House” and thereafter the plaintiff established his

business by forming a company named Jagdish Foods Private Limited and thereafter registration is obtained by registering the trade name "Jagdish" before the registering authority. It is submitted by Mr Ray that the defendants have started their business in their two shops, which are located just at the side of the plaintiff's shop only with a view to market their product by taking advantage of the reputation and goodwill of the plaintiff. Mr Ray also submitted that the trial Court has give proper reasons and the order of the trial Court is not required to be interfered with by this Court.

6) I have heard both the learned advocates at length and I have also gone through the record and proceedings, which is called for from the trial Court. I have also considered various judgments cited by the learned advocates in connection with the subject matter.

7) It is required to be noted that so far as the plaintiff company is concerned, prior to the formation of the company the forefathers of the Managing Director, Nitinbhai Thakkar used to do business in the name and style of "Jagdish Khaman House". Thereafter, in the year 1986 the plaintiff company is established doing the business in farsan and other sweets. It is not in dispute that the plaintiff has also registered his trademark "Jagdish" and is using the said trademark on their packets with distinct get up and colour. The licence has been issued by the Registrar of Trade Marks in the year 1988.

8) Mr G.C.Ray has argued that the defendants have started their business only two years prior to filing of the suit i.e. in the year 2003. However, Mr YJ Trivedi has argued that his clients have started the

business in the name and style of Jagdish Sweet and Farsan in the year 1998. Mr Trivedi has submitted that no doubt the plaintiff is prior user of the word "Jagdish". It is required to be noted that the defendants have not produced any documentary evidence to show as to from which date they are in the market by using the word "Jagdish" in their business. The defendants have not even produced any evidence to show that they are continuously doing the business since 1998. However, even if it is assumed that the defendants are in the market and are using the said word "Jagdish" in the business since 1998 then also it is clear that the plaintiff is the prior user and is in the market since many years. The plaintiff has got the trademark and he is entitled to have statutory protection against infringement of his trademark.

9) Mr Trivedi submitted that since word "Jagdish" is not per se registered and since only label is registered, the suit for infringement is not maintainable for which he has relied upon Section 17 of the Act. Mr Trivedi has further submitted that word "Jagdish" is name of Lord Vishnu and is common in usage. He has relied upon the decision of the Delhi High Court in case of S.B.L. Limited v. Himayalaya Drug Co., AIR 1998 Delhi 126. In the said case the Delhi High Court has held that the test for judging a case for infringement and/or passing off remains the same when applied to medicines and pharmaceuticals. The aforesaid case was in connection with the medical preparations and considering the facts of the case the Delhi High Court has held that two products do not have phonetic similarity as to make it objectionable. The cartons of the two products respectively of the plaintiff and the defendants show that there is no possibility of one being accused of deceptively similar with the other and the likely customer mistaking one with the other.

10) Mr Trivedi has also relied upon the judgment of the Supreme Court in the case of J.R.KAPOOR v. MICRONIX INDIA, 1994 Supp (3) SCC 215. In the said case the appellant and respondent manufacture and sell various electrical and electronic goods. The appellant was one of the partners of M/s Micronix India along with the respondent-plaintiff. The partnership was dissolved on 14.2.1992 and under terms of compromise the said trade mark was allotted to respondent-plaintiff. Thereafter, the appellant-defendant started his own business in the name and style of M/s Microtelmatix with the trade name MICROTEL. The respondent-plaintiff thereafter filed the suit and sought for injunction against the use of the trade name MICROTEL. The learned Single Judge granted the injunction and the Division Bench dismissed summarily the appeal filed against the same. The Supreme Court held that phonetically the words being totally dissimilar are not going to create any such confusion in the mind of the users and that there is not even the remotest chance of the buyers and users being misguided or confused by the two trade names and logos.

11) In the case of **Laxmikant V. Patel Vs. Chetanbhai Shah and Another**, reported in (2002) 3 SCC 65, the Honourable Supreme Court held as under in paragraphs 8, 13 and 14 :

> "8. It is common in trade and business for a trader or a businessman to adopt a name and/or mark under which he would carry on his trade or business. According to Kerly (Law of Trade Marks and Trade Names, 12thEdition, para 16.49), the name under which a business trades will almost always be a trade mark (or if the business provides services, a service mark, or both). Independently of questions of trade or service mark, however, the

name of a business (a trading business or any other) will normally have attached to it a goodwill that the Courts will protect. An action for passing-off will then lie wherever the defendant company's name, or its intended name, is calculated to deceive, and so to divert business from the plaintiff, or to occasion a confusion between the two businesses. If this is not made out there is no case. The ground is not to be limited to the date of the proceedings; the court will have regard to the way in which the business may be carried on in the future, and to its not being carried on precisely as carried on at the date of the proceedings. Where there is probability of confusion in business, an injunction will be granted even though the defendants adopted the name innocently.

13. In an action for passing off it is usual, rather essential, to seek an injunction temporary or ad-interim. The principles for the grant of such injunction are the same as in the case of any other action against injury complained of. The plaintiff must prove a prima facie case, availability of balance of convenience in his favour and his suffering an irreparable injury in the absence of grant of injunction. According to Kerly (Ibid, para 16.16) passing off cases are often cases of deliberate and intentional misrepresentation, but it is well-settled that fraud is not a necessary element of the right of action,and the absence of an intention to deceive is not a defence though proof of fraudulent intention may materially assist a plaintiff in establishing probability of deception. Christopher Wadlow in Law of Passing Off (1995 Edition, at p. 3.06) states that the plaintiff does not have to prove actual damage in order to succeed in an action for passing off. Likelihood of damage is sufficient. The same learned author states that the defendant's

state of mind is wholly irrelevant to the existence of the cause of action for passing off (ibid, paras 4.20 and 7.15). As to how the injunction granted by the Court would shape depends on the facts and circumstances of each case. Where a defendant has imitated or adopted that plaintiff's distinctive trade mark or business name, the order may be an absolute injunction that he would not use or carry on business under that name. (Kerly, ibid, para 16.97).

14. In the present case the plaintiff claims to have been running his business in the name and style of Muktajivan Colour Lab and Studio since 1982. He has produced material enabling a finding being arrived at in that regard. However, the trial Court has found him using Muktajivan as part of his business name at least since 1995. The plaintiff is expanding his business and exploiting the reputation and goodwill associated with Muktajivan in the business of Colour Lab and Photo by expanding the business through his wife and brother-in-law. On or about the date of the institution of the suit the defendant was about to commence or had just commenced an identical business by adopting the word Muktajivan as a part of his business name although till then his business was being run in the name and style of Gokul Studio. The intention of the defendant to make use of the business name of the plaintiff so as to divert his business or customers to himself is apparent. It is not the case of the defendant that he was not aware of the word Muktajivan being the property of the plaintiff or the plaintiff running his business in that name, though such a plea could only have indicated the innocence of the defendant and yet no difference would have resulted in the matter of grant of relief to the plaintiff because the likelihood of injury to the plaintiff was

writ large. It is difficult to subscribe to the logic adopted by the Trial Court, as also the High Court, behind reasoning that the defendants' business was situated at a distance of 4 or 5 kms. from the plaintiff's business and therefore the plaintiff could not have sought for an injunction. In a city a difference of 4 or 5 kms. does not matter much. In the event of the plaintiff having acquired a goodwill as to the quality of services being rendered by him, a resident of Ahmedabad city would not mind travelling a distance of a few kilometers for the purpose of availing a better quality of services. Once a case of passing off is made out the practice is generally to grant a prompt ex parte injunction followed by appointment of local Commissioner, if necessary. In our opinion the trial Court was fully justified in granting the ex parte injunction to the plaintiff based on the material made available by him to the Court. The trial Court fell in error in vacating the injunction and similar error has crept in the order of the High Court. The reasons assigned by the Trial Court as also by the High Court for refusing the relief of injunction to the plaintiff are wholly unsustainable."

12) In the case of **Mahendra & Mahendra Paper Mills Ltd. Vs. Mahindra & Mahindra Limited**, reported in (2002) 2 SCC 147, it has been held by the Honourable Supreme Court as under in paragraph 16 :

"16. This question has been considered by different High Courts and this Court in umpteen cases from time to time. On analysis of the principles laid down in the decisions, certain recognised parameters relating to the matter have emerged. Without intending to be exhaustive some of the principles which are accepted as well settled may be stated thus: that whether there is a

likelihood of deception or confusion arising is a matter for decision by the court, and no witness is entitled to say whether the mark is likely to deceive or to cause confusion ; that all factors which are likely to create or allay deception or confusion must be considered in combination; that broadly speaking, factors creating confusion would be, for example, the nature of the market itself, the class of customers, the extent of the reputation, the trade channels, the existence of any connection in course of trade, and others."

13) In the case of **N.R.Dongre and others Vs. Whirlpool Corporation and Another** reported in (1996) 5 SCC 714, the Supreme Court has held that passing off action is maintainable in law even against a registered owner of the trade mark, and, therefore, the fact that defendants have obtained a registration by itself is not sufficient to render the suit not maintainable.

14) In **Cadila Health Care Limited Vs. Cadila Pharmaceuticals Limited** reported in **(2001) 5 SCC 73,** the Supreme Court has considered the question about deceptive similarity in the matter of passing off action. In paragraph 16 of said judgment, it has been held that the marks must be compared as a whole. It is not right to take a portion of the word and say that because that portion of the word differs from the corresponding portion of the word in the other case there is no sufficient similarity to cause confusion. The true test is whether the totality of the proposed trade mark is such that it is likely to cause deception or confusion or mistake in the minds of persons accustomed to the existing trade mark. In the aforesaid case, in paragraph 17, the Supreme Court has held that in the trade mark matters, it is now necessary to go into the question of 'comparable strength' of the cases of

either party, apart from balance of convenience.

15) In the case of **Ramdev Food Products Pvt. Ltd. Vs. Arvindbhai Rambhai Patel & Others,** reported in 2006 (7) Supreme 224, the Honourable Supreme Court has held as under in paragraphs 82 to 84 :

> "82. Although, the defendant may not be using the actual trade mark of the plaintiff, the get up of the defendant's goods may be so much like the plaintiff's that a clear case of passing off could be proved. It is also possible that the defendant may be using the plaintiff's mark, the get up of the defendant's goods may be so different from the get up of the plaintiff's goods and the prices also may be so different that there would be no probability of deception of the public. However, in an infringement action, an injunction would be issued if it is proved that the defendant is improperly using the plaintiff's mark. In an action for infringement where the defendant's trade mark is identical with the plaintiff's mark, the Court will not enquire whether the infringement is such as is likely to deceive or cause confusion. The test, therefore, is as to likelihood of confusion or deception arising from similarity of marks is the same both in infringement and passing off actions. [See Ruston & Hornsby Ltd. v. The Zamindara Engineering Co., (1969) 2 SCC 727]
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> 83. In Parle Products (P) Ltd. v. J.P. And Co., Mysore [(1972) 1 SCC 618], emphasis was laid on the broad and essential features of the impugned mark holding:
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> > ".... It would be enough if the impugned mark bears such an overall similarity to the registered mark as would be likely to mislead a person usually dealing with one to accept the

other if offered to him..."

84. Noticing the similarity of the mark in question with that of the impugned mark, it was opined that "if one was not careful enough to note the peculiar features of the wrapper on the plaintiffs' goods, he might easily mistake the defendants' wrappper for the plaintiffs' if shown to him some time after he had seen the plaintiffs'".

It was further stated :

"....After all, an ordinary purchaser is not gifted with the powers of observation of a Sherlock Homes. We have therefore no doubt that the defendants' wrapper is deceptively similar to the plaintiffs' which was registered. We do not think it necessary to refer to the decisions referred to at the bar as in our view each case will have to be judged on its own features and it would be of no use to note on how many points there was similarity and in how many others there was absence of it."

In paragraph 93 of the said judgment, Supreme Court has held as under with regard to acquiescence :

"93. Acquiescence is a facet of delay. The principle of acquiescence would apply where: (i) sitting by or allow another to invade the rights and spending money on it; (ii) it is a course of conduct inconsistent with the claim for exclusive rights for trade mark, trade name, etc."

16) In the instant case, there is nothing on record to show that the plaintiffs allowed the defendants to use trade mark/trade name

"Jagdish" for the purpose of their business. The documentary evidence, in fact, suggests that for years together, word "Jagdish" was being used by the plaintiff.

17) Considering the material and evidence on record, the plaintiff has prima facie established that they are prior users and even if it is assumed that the defendants are in business since 1998, the fact remains that the plaintiff has started their business in the year 1973 initially in the name of M/s Jagdish Khaman House as a partnership firm. Thereafter, the plaintiff Nitinbhai B Thakkar was relieved from the said partnership and he has established the company known as M/s Jagdish Foods Private Limited in the year 1986-87. The plaintiff is doing the business in the name and style of M/s Jagdish Foods Private Limited with the Trade Marks Registration office.

18) The trial Court has given detailed reasons for granting injunction and it is not in dispute that the plaintiff has already instituted proceedings against other traders, who are using the said word Jagdish in their trade. The plaintiff has filed present proceedings for infringement of its trade mark as well as for passing off action. The defendants cannot take advantage of goodwill and reputation of plaintiff's product. Looking to the product in question, there are all chances that the people are likely to be confused and may get an impression that the goods sold by the defendants are that of the plaintiff's. The customers who are going to consume such food articles are not expected to carry out rigorous enquiry, etc. while purchasing such goods. It is therefore rightly found by the trial Court that the defendants may likely to pass off their goods as that of the plaintiff's. The trial Court has in paragraph 14 of the judgment held as under:-

"14. Here, looking to the documentary evidence, the plaintiff has

established the fact, he is the sole proprietor of the trademark “Jagdish” and he has used the said trade name prior to the defendants. The defendants have not got any trademark. The plaintiff has incurred huge amount to earn the goodwill in his business under word “JAGDISH”. The plaintiff has fulfilled all three factors for an action of passing off namely prior use, establishment of the goodwill and reputation and chance of future loss that may be caused by virtue of using the said trademark by the defendants in deceptively similar manner. Thus, where the plaintiff is suffering irreparable injury/loss due to the invasion upon his legal right by defendants and the balance of convenience is also in his favour, the plaintiff is entitled to injunction restraining the defendants from using his trademark. Here, the defendants are using the label of the plaintiff's mark in their bags. Where a comparison of the two labels shows that a customer is likely to be led away in believing the defendant's label to be that of the plaintiff and the goods marketed under the trade mark/label of the defendants to be that of the plaintiff, it is a clear case of breach of copy right of the plaintiff. It is well settled principle of law that, a person shall not be allowed to trade upon, under a name so closely resembling to that of the plaintiff so as to cause confusion in the mind of the general public. Nobody can allow to represent his goods as that of others. Thus, as discussed above, the plaintiff has established his prima facie case and the balance of conveniences is also in his favour. In this situation, if the injunction as prayed for is not granted, then the plaintiff would suffer a loss in his reputation, goodwill and it would also cause damages in his business which cannot be compensated in terms of money. Therefore, I am of the opinion that, the defendants who are infringing the legal rights of the plaintiff are required to be

prevented from doing so and it would also meet the ends of justice."

19) Considering the aforesaid aspect of the matter and the case laws on the subject, in my view, the order of injunction granted by the trial Court restraining the defendants from using the word "JAGDISH" in its business is not required to be interfered with, especially, when it has come on record that the plaintiff is in business and have acquired goodwill and reputation and looking to the product in question there are all chances that the people are likely to be misguided. Considering the aforesaid aspect of the matter, I do not find any case on merits in favour of the appellants – original defendants. The appeal is therefore dismissed with no order as to costs.

20) In view of above order of dismissal of main appeal, no order on Civil Application No.13728 of 2006.

21) It is clarified that the observations made in this order may be treated to be tentative in nature and suit may be decided as per the evidence on record.

22) At this stage, Mr Y.J. Trivedi, learned advocate for the appellants requested that the interim relief granted by this Court while admitting this appeal may be continued as his clients are likely to approach higher forum. The request is reasonable. The order of the trial Court which is suspended by this Court during the pendency of this appeal is ordered to be continued till 30th March 2007.

(P.B.Majmudar, J.)

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